Supreme Court of the United States

OCTOBER TERM, 1922

[No. 128.]

FRANK MOORE, ED. HICKS, J. E. KNOX, ET AL.,
APPELLANTS,

v.

S. H. DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE APPELLANTS.

MOORFIELD STOREY,
Counsel for the Appellants.

[illegible]

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STATEMENT OF THE CASE.

This is a petition for a writ of habeas corpus brought by five citizens and residents of the State of Arkansas against the keeper of the Arkansas State Penitentiary (Record, pp. 1–10).

The petitioners are Negroes who have been indicted, tried and convicted of murder for killing one Clinton Lee and are now under sentence of death. They petitioned the District Court of the United States for a writ of habeas corpus, but on demurrer to that petition the court without hearing any evidence on the facts sustained the demurrer and dismissed the petition (Record, pp. 100–101). The petitioners having appealed and filed an assignment of errors, the court, "being of opinion that there exists probable cause for an appeal in this cause," allowed the appeal (Record, p. 102).

Assignment of Errors.

The appellants claim that the court erred in ruling that the facts stated in the petition were not sufficient to entitle the petitioners to relief (Record, p. 102).

The petition for the writ of habeas corpus sets forth the case, and in stating it the historical order of events will be adopted, not the order in the petition.

The Origin of the Trouble.

The petitioners say "that prior to October 1, 1919, they were farmers, share croppers; that nearly all the land in Phillips County is owned by white men; that same is rented out to share croppers to be tilled on shares, one half to the tenant and the other half to the owner; that for some years past there has grown up a system among the land owners of furnishing the negro tenants supplies on which to make crops and which is calculated to deprive and does deprive the negro tenants of all their interest in the crops produced by them; that in pursuance of this system, they refused to give their share croppers any itemized statement of account of their indebtedness for supplies so furnished, refused to let them move or sell any part of their crops, but themselves sell and dispose of the same at such prices as they please, and then give to the negroes no account thereof, pay them only such amount as they wish and in this way kept them down, poverty stricken and effectually under their control; that for the purpose of protecting themselves, if possible against the oppressive and ruinous effects of this system, the negro farmers organized societies, with the view of uniting their financial resources in moral and legal measures to overcome the same, which fact became quickly known to the plantation owners; that such owners were bitterly opposed to such societies, sought to prevent their organization, ordered the members to dis-

continue their meetings and sought by every means they could employ to disrupt them; that on the 30th day of September, 1919, petitioners and other members of the Ratio Lodge, near Elaine, learned that some of the negro farmers of a near-by plantation had employed U. S. Bratton, an attorney of Little Rock, Arkansas, to represent them in effecting a settlement for them with their landlords, or if he could not, to institute legal proceedings to protect their interests, and that either he, or his representatives, would be there on the following day to meet with all the parties concerned, perfect the arrangements, and learn all the facts as far as possible, and they decided to hold a meeting with the view of seeing him while there, and engaging him as an attorney to protect their interests; that accordingly they met that night at Hoop Spur Church house" (Record, pp. 3–4).

That while petitioners with others of their race were peaceably and lawfully assembled in their church with no unlawful object in view, and with no desire or purpose to injure any one, white persons who had come in automobiles to break up the meeting began firing guns or pistols from the outside into and through the church, causing a great disturbance of those assembled; that one Adkins who was in the attacking party was killed either by members of his own party or by some other person unknown to the petitioners; that the attacking party sent out word to the county seat that Adkins had been killed by Negroes, being shot down in cold blood while on a peaceful mission; that the reports spread like wildfire into other counties and into other States, notably the State of Mississippi; that early the next day a large number of white men "armed themselves and rushed to the scene of the trouble and to adjacent regions and began the indiscriminate hunting, shooting and killing of negroes;" that they were later joined by white men from adjacent counties and from the State of Mississippi, and that a great many innocent Negro men and women, many of whom were pick-

ing cotton in the fields, were killed in cold blood; that Clinton Lee was shot during the morning; that the petitioners, together with a large number of their race, both men and women, were taken to the Phillips County jail, at Helena, incarcerated therein, and charged with murder (Record, pp. 1, 2).

The Committee of Seven and its Acts.

A committee of seven composed of leading Helena business men and officials, to-wit: Sebastian Straub, Chairman, H. D. Moore, County Judge, F. F. Kitchens, Sheriff, J. G. Knight, Mayor, E. M. Allen, J. E. Horner and T. W. Keesee, was selected by the municipal and county authorities (Record, pp. 2, 11, 12), or as is stated by the committee in a letter to the Governor of Arkansas "appointed by him" (Record, p. 71) "for the purpose of probing into the situation and picking out those to be condemned to death and those to be condemned and sentenced to the penitentiary" (Record, p. 2). That shortly after they were placed in jail, "a mob was formed in the city of Helena, composed of hundreds of men, who marched to the county jail for the purpose and with the intent of lynching your petitioners and others, and would have done so but for the interference of United States soldiers and the promise of some of said committee and other leading officials that if the mob would stay its hand they would execute those found guilty in the form of law" (Record, p. 3). "That said committee assumed charge of the matter and proceeded to have brought before them a large number of those incarcerated in jail and examined them regarding their own connection and the connection of others charged with participation in said trouble; that if evidence unsatisfactory to said committee was not given they would be sent out and certain of their keepers would take them to a room in the jail which was immediately adjoining and a part of the courthouse building where said committee was sitting, and torture them by

beating and whipping them with leather straps with metal in them, drawing the blood at every lick until the victims would agree to testify to anything their torturers demanded of them; that there was also provided in said jail, to further frighten and torture them, an electric chair, in which they would be put naked and the current turned on to shock and frighten them into giving damaging statements against themselves and others; also strangling drugs were put up their noses for the same purpose and by these methods and means false evidence was extorted from negroes to be used and was used against your petitioners" (Record, pp. 2, 3).

THE CREATION OF PUBLIC OPINION.

"Petitioners further say that on every day from October 1 until after their trial on November 3, 1919, the press of Helena and the State of Arkansas carried inflammatory articles giving accounts of the trouble, which were calculated to arouse and did arouse bitter feeling against your petitioners and the other members of their race; that on October 7, 1919, the Helena *World*, a newspaper published and printed in the city of Helena, and having a wide and almost universal circulation throughout said county, published an article written and given out by Mr. E. M. Allen, a member of said committee of seven, for and on behalf of said committee, purporting to give the facts concerning what he called 'not a race riot,' but a 'deliberately planned insurrection of the negroes against the whites,' and alleges that their Union was 'established for the purpose of banding negroes together for the killing of white people'" (Record, p. 3, pp. 11–14). In this he said:

> "The fight at Hoop Spur was unpremeditated as far as the negroes were concerned as they were organizing their forces Wednesday morning to attack and capture Elaine but when runners informed the leaders that white men were entering the woods at Hoop Spur they decided to go

up and wipe out the little gang that was reported to be there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena and the battle resulted.

"Every negro who joined these lodges was given to kill white people. Unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of schedule. . . .

"I have cross-examined and talked to at least one hundred prisoners at Elaine. They belong to different lodges in that section. The stories they tell are almost identical as to the promises and representations made by Hill. He even told them probably some of the negroes would be called upon to die before 'Equal rights' would be assured, but they must look upon themselves as crusaders and die if necessary to secure the freedom of the other members of their race" (Record, p. 14).

An examination of the statements attributed to Hill shows that they were the talk of a swindler and not of a conspirator (Record, pp. 12–13). Mr. Allen's statement itself says, "He simply played upon the ignorance and superstition of a race of children" (Record, p. 14).

The Indictment and Trial.

It is further alleged that the Circuit Court of Phillips County convened on October 27, 1919; "that a grand jury was organized which was composed wholly of white men, and which included one of the committee of seven and many who were in the posses organized to fight the negroes; that during its session the petitioners and others of the prisoners were frequently carried before it in an effort to extract false incriminating admissions, and that both before and after they were frequently whipped, beaten and tortured; that those in charge had some way of learning when the evidence was unsatisfactory to the grand jury, and this

was always followed up by beating and whipping; that by these methods some of the negroes were forced to testify against the others, including two who testified against the petitioners;" that on the 29th October a joint indictment was found against the petitioners, accusing them of the murder of Clinton Lee whom they had never seen or known; that on the 3d November, 1919, they were taken into court and told of the charge and that a certain lawyer was appointed to defend them; that they were given no chance to employ an attorney of their own choice. The attorney appointed "did not consult with them, took no steps to prepare for their defense, asked nothing about their witnesses, though there were many who knew the petitioners had nothing to do with the killing of Lee; that they were immediately placed on joint trial before an exclusively white jury," and that only the witnesses for the State were called, no witnesses being called by the counsel for the defense; that the jury went out and in two or three minutes returned with the verdict of guilty of murder in the first degree, which was followed by a sentence to death by electrocution on December 27, 1919. They further say that the trial lasted less than an hour (Record, pp. 4, 5).

THE INFLUENCE OF THE MOB ON COURT AND JURY.

Petitioners further say "that large crowds of white people bent on petitioners' condemnation and death thronged the courthouse and grounds and streets of Helena during the trial of petitioners and the other negro defendants; that on account of the great publicity given theirs and the other cases, on account of their being charged with connection with an insurrection against the white people, and that four or five white men were killed, on account of the fact that they are negroes, and those who run the court, the Judge upon the bench, the sheriff, the clerk and all the jurors being white men, on account of the fact that it was stated and

widely published that the purpose of the negroes was to kill the whites and take their property, and on account of all the race prejudice which normally exists and which was enhanced a thousand-fold at the time, by bitterness beyond expression, it was impossible for them to get a fair and impartial trial in said court before a jury of white men; that the attorney appointed to defend them knew that the prejudice against them was such that they could not get a fair and impartial trial before a white jury of said county, yet he filed no petition for a change of venue, did not ask the court for time to prepare a defense, and did nothing to protect their interests; that the court did not ask them whether they had counsel, or desired to employ counsel, or were able to do so; but simply said a lawyer, whom he named, would defend them; that they have, therefore, not had a trial, have had no opportunity to make a defense, but that their case was closed against them as virtually and effectually as if on a plea of guilty; that if they had been given the opportunity they would have employed counsel of their own choice and have made a defense, their ability to do so having been demonstrated since their conviction; that the feeling against petitioners was such that it overawed the Judge on the bench, the jury, the attorney appointed to defend them and every one connected with said court; that all, Judge, jury and counsel, were dominated by the mob spirit that was universally present in court and out, so that if any juror had had the courage to investigate said charge with any spirit of fairness, and vote for an acquittal, he himself would have been the victim of the mob; that, such was the intensity of feeling against petitioners and the other defendants, that had counsel for them objected to the testimony of the two witnesses against them, said Ward and Jefferson, on the ground that it was extorted by beating and torture, as they are advised he should have done, he himself would have been the victim of the mob; . . . that petitioners were ignorant of their rights, had never been in court before, and had

counsel asked them about this testimony they would have told him how it was obtained; that through fear of the mob spirit no witness was called in their behalf and they themselves were advised not to take the stand on their own behalf; that as a result of the mob domination of court, counsel and jury, the court, although a court of original jurisdiction in felony cases, lost its jurisdiction by virtue of such mob domination, and the result was but an empty ceremony, carried through in the apparent form of law, and that the verdict of the jury was really a mob verdict, dictated by the spirit of the mob and returned because no other verdict would have been tolerated, and that the judgment against them is, therefore, a nullity" (Record, pp. 5–6).

This is in substance the case stated in the petition and on demurrer must be taken as true, but the allegations are abundantly sustained by other evidence.

EVIDENCE IN RECORD CONFIRMING ALLEGATIONS OF PETITION.

Evidence of Public Feeling.

The atmosphere which surrounded the courtroom where the appellants were tried is shown by the written evidence which is found in the record. The statement made by Allen for the committee of seven that the disturbance in which so many Negroes and a few whites were killed was a "deliberately planned insurrection of the negroes against the whites," that "they were organizing their forces Wednesday morning to attack and capture Elaine; that unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of time" was published to create a public opinion against the Negroes. It could have had no other effect, but the record fails to disclose any evidence to support its allegations. "The list of those the negroes plotted to kill on which Allen's name was" was never produced; nor were any of the other papers confiscated (Record, p. 12).

The letter of the committee to the Governor is proof positive of the feeling. In it they say:

> "With all the provocation our people refrained from mob violence. The reason they did this was that this committee gave our citizens their solemn promise that the law would be carried out";

and further that if the Governor shows mercy to the men convicted, it would be difficult if not impossible to prevent mob violence, *i.e.*, lynching.

There can be no question what the committee's promise meant, especially when we find in the same letter:

> "There were 150 negroes legally guilty of murder in the first degree—actively present and assisting in the wilful and deliberate murder of white citizens—and this Committee assisted in seeing that only *leaders* were brought to trial" (Exhibit E, p. 71).

This is abundantly confirmed by the resolution adopted by the Richard L. Kitchens Post, American Legion, which contains the statement that "when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld."

This is followed by a protest against any commutation of the sentence on the ground that the appellants and six others were "ring leaders and guilty murderers" (Exhibit H, Record, pp. 76, 77).

If further proof were needed, we find it in the resolution of the Helena Rotary Club "attended by seventy-five members, representing seventy-five leading industrial and commercial enterprises of the city" concurring in the resolution of the Richard L. Kitchens Post (Exhibit I, p. 78), and the action of the Lions Club of Helena at a meeting at-

tended by sixty members, representing sixty leading industrial and commercial enterprises of this city to the same effect (Exhibit J, p. 78).

The combined influence of such men as these insisting that these men were guilty and must be convicted must have created an atmosphere against which the court found it impossible to contend. The language that "justice will be done and the majesty of the law upheld" does not mean proceedings resulting in an acquittal. Only conviction followed by execution would have been regarded as an equivalent for lynching.

Proof that the mob was in control is found in the treatment of the counsel who came from Little Rock to advise the Negroes, who was charged with murder, then indicted for barratry and finally smuggled out of town with the aid of the judge who presided at the trial of these petitioners (Record, p. 4).

EVIDENCE THAT THE WITNESSES WERE TERRORIZED.

The fact that the committee met and terrorized the witnesses by beating and otherwise in order to make them testify against the convicted men is not only proved by the testimony of the witnesses themselves (see affidavit of WALTER WARD, Exhibit B, Record, p. 15, and affidavit of JOHN JEFFERSON, Exhibit C, Record, p. 18), but by the testimony of the white men who did the beating. (See affidavit of T. K. JONES, Special Agent for the Missouri Pacific Railroad in charge of the Memphis Division and H. F. SMIDDY, special officer employed by the Missouri Pacific Railroad under Mr. Jones, and later employed by the city of Helena as plain-clothes man, and afterward as deputy sheriff of Phillips County in which the town of Helena was situated (Record, pp. 86 to 99, both inclusive.))

Testimony of Smiddy.

Mr. Smiddy testifies to the condition of the church and the indications that it was attacked and shot into from the north, that they found some literature of the Farmers and Laborers Union, but "nothing to indicate a criminal or unlawful purpose on the part of the organization" (p. 92). He also testifies as to what was done on the morning of October 1st, stating that "a great many people from Helena and other portions of Phillips County and other surrounding counties began coming in, quite a large number of them, several hundred of them, and began to hunt negroes and shooting and killing them as they came to them." His posse was composed of fifty or sixty men (Record, p. 93).

> "We began firing into the thicket from both sides, thinking possibly there were negroes in the thicket and we could run them out and kill them. . . . I saw five or six negroes come out unarmed holding up their hands, some of them running and trying to get away. They were shot down and killed by members of the posse" (Record, p. 93). "I did not see a single negro fire a shot. I was present when Jim Miller and Arthur Washington was killed and Milliken Giles was injured. I shot Milliken Giles myself" (Record, p. 93). "He was in the edge of the thicket trying to hide. When I shot him he was not trying to shoot anybody and didn't have a gun. . . . Arthur Washington was killed as he ran away from his house."

Smiddy was there when Mr. James Tappan was killed, and felt

> "perfectly sure he was accidentally killed by a member of our own posse on the other side of the thicket from us" (Record, pp. 93, 94). "I was shot in the right shoulder by a stray shot from some member of our posse," and so was Mr. Dalzell (Record, p. 94).

Smiddy was in the automobile with Clinton Lee who was shot by a bullet coming from the south side. He did

not see anybody at the time shot was fired. A short time before the shot there were twenty or thirty Negroes crossing the dirt road and going into the cornfield on the east side. "They were running,—seemed to be scared and trying to get out of the way of the white folks. I did not see any negro with a gun in his hand and they were in plain view." During the afternoon "a crowd of men came into the vicinity of Elaine from Mississippi and began the indiscriminate hunting down, shooting and killing of negroes. They shot and killed men, women and children" who had no connection with the killing, and whether members of the Union or not (p. 95).

He describes how the Negroes were whipped and treated cruelly to compel them to testify: states that frequently during the course of whipping formaldehyde was used to further torture and frighten them, and describes the electric chair (Record, p. 96). He says, "No negro freely and voluntarily testified in these cases," and tells how they were forced (Record, p. 97).

To the best of his recollection Walter Ward was whipped three times to make him give the testimony, and formaldehyde put to his nose. He says he knows that no Negro crossed the road south of McCoy's house, knelt in the road and fired a gun, because he was looking right at them. He also knows there was no loose horse between them and the Negroes and "that no negro who crossed the dirt road down there had a gun in his hand" (pp. 97, 98).

He was present at the trial and knows that there "never was a chance for the petitioners who were defendants in these cases to have been acquitted. No man could have sat upon any jury at these trials and have voted for an acquittal and continued to live in Phillips County." Large crowds attended the trial and all so far as he was able to observe "were bent upon their conviction and death. If any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob" (p. 98).

"I do know that there were between two hundred and three hundred negroes killed that I saw with my own eyes. The only white men that I knew of that were killed were Atkins, Tappan, Lee, Lily and two soldiers whom I do not know" (p. 99).

Testimony of Jones.

Mr. Jones in like manner testified that he saw the Negroes whipped, saw the formaldehyde put into their noses, that he helped to whip Frank Moore and J. E. Knox, that he probably whipped two dozen himself. He says, "So far as I know no negro made a voluntary statement that implicated any other negro in anything criminal and I believe I would have known it if it had been done" (p. 89). He says that while at the McCoy house "I saw a bunch of negroes cross the railroad and dirt road going east. . . . I didn't see any negro in that bunch with a gun or other weapon in his hand. . . . I know positively that no negro stopped in the road, kneeled and made a shot or two up the road, because if he had done so I would have seen him as I was looking right at the bunch of negroes that crossed the road" (Record, p. 88).

The witnesses Jones and Smiddy are white men and responsible. Their testimony is clear and positive, and confirms the statements of the petitioners in all respects. If these affidavits are true, the petitioners were entirely innocent of the crime for which they were convicted, and no motive for making such affidavits, if they were false, can be suggested.

Evidence at the Trial.

If the only evidence in the case was the record of the trial, it would be clear that the appellants were not fairly tried. A statement of the proceedings follows, and is perhaps needlessly long, but the aim has been to omit nothing essential.

The first witness called at the trial was R. L. BROOKS, a white man, who testified that he was with Lee on the 1st of October, and that Lee was sitting in an automobile when he was hit by a bullet from a rifle which caused his death in about five minutes. Witness testified that he heard two bullets, and that between them there was an interval about as long as it would take a man to unload and reload his gun. The bullet came from the south. He had not the least idea who fired the shots, and neither heard the report of the gun nor saw the man who fired it (Record, pp. 28, 29).

The next witness was Dr. O. PARKER, who testified that he was present when Lee was brought in and saw him die, but did not examine the body (Record, p. 29).

The next witness was TOM FAULKNER, who testified that he knew Clinton Lee and was fifty to one hundred feet away from him when he was killed; that he was then in a car in front of the McCoy house with all the cars; that about the time the shots were fired he saw three Negroes probably three or four hundred yards south of the house, saw one fire two shots toward the car, but he did not know who the Negroes were and could not identify any of them (Record, pp. 30, 31).

It will be observed that he only saw three Negroes, not a considerable body.

The next witness was JOHN JEFFERSON who testified that he knew the several defendants, apparently calling the appellant indicted as Ed Coleman by the name of Sweat Coleman. He testified that he belonged to the Farmers Household and Progressive Union of which Ed Hicks was the president of Elaine Lodge. Said he learned that Joe Knox was the president of it. He knew none of the board members other than the president, vice-president and secretary. Asked whether any of the men Moore, Coleman and Hall were leaders or not, answered, "I knew Frank Moore was there, but I don't know whether he was a leader, nor the other two men you called." He said that when he went to the lodge they had guns, and said they were "looking for

them to come down and pick them up." "Looking for who?" "Looking for the white folks to come down there and break the meeting up." "What did they have their guns for?" "They had their guns for protection to fight with." First time he went he had no gun, and when asked what he brought to fight with replied that he brought nothing. He went to only one meeting after he joined and that was the Friday night before the trouble. In answer to a leading question, that he met Thursday night before the trouble. He knew Hicks, Frank Moore and Sweat Coleman were there. Did not see Knox or Hall there. Testified these fellows had guns there that night.

On Wednesday morning he went out to Frank Moore's who lived opposite Sweat Coleman, the next house being that of Frank Hall, who was Paul Hall's brother. Got there before daylight. There were forty-five or fifty scattered around in the dark sitting down talking. Had guns of various sorts. Saw Moore, Coleman and Paul there, but did not see Knox and Hicks before daylight. They were all sitting around talking. Frank Moore was in the house. Asked what he saw, witness replied, "I heard him come out of the house." He said "they had been into it at Hoop Spur, and they had killed a man; he had taken a 45 automatic and pair of handcuffs." That he saw Hicks and Knox later in the day. All there, some over at his house, some at Sweat's house, some at Paul's house, and some around the bushes. About twelve or one o'clock heard Frank Moore say: "Don't you hear that shooting? Come on, let's go out there and help them people out."

> "And everybody came up there and he paired us all up, put us two and two, Frank Moore, Hicks and Knox. Moore in front said, 'Let's go and help them people out in the shooting. Just go out there and help them out.' Moore was in front, Hicks along in the middle walking along with the rest, Knox at the rear end. He said, 'If anybody breaks ranks he was going to shoot them down.' Paul Hall was in

the gang, but don't know where he was. Sweat Coleman was in the gang not doing anything more than the rest of them, there with his gun. Never heard Sweat say anything. I was near the rear not far from Ed Hicks. All of them had guns. We come out through the field about a quarter of a mile from the house and we saw this crowd of men. This fellow Moore stopped. Hicks said, 'Let's go across this way and cut them off.' Asked who, he answered, 'These white gentlemen at this house.' A quarter of a mile from the house we turned and went across the railroad. Ed Hicks and Frank Moore, we all went across about a quarter of a mile from the McCoy house, crossing the railroad. I saw Frank Hicks make the shots. He squatted that way, took aim and made two shots."

"What did he say?"

"I did not hear Moore say anything. Ed Hicks was across the road over in the field twenty-five or thirty yards from the fellow that shot. Don't know where Sweat Coleman was, but he was in the gang somewhere. Joe Knox was on the side of railroad fifteen or twenty yards from Hicks. Don't know where Paul Hall was. After Hicks made the first shot he took out his gun and reloaded it, and some one in the gang told him not to shoot. Then he made a second shot. Said, 'I would have got that guy if it had not been for the horse.' There was a horse between these gentlemen and Hicks. After that we went on across. All split up after the two shots were made, some on one side of railroad and some on east side."

Cross-examination.

"Think it was about a mile from McCoy's house where the shooting was done. I have been indicted for murder in the first degree. I told somebody this story before I went on the stand. Talked about it around here. I don't know who told Hicks not to shoot. Never was before the grand jury. I gave my testimony in a room with six or seven men there. I did not expect to kill anybody when I went into the lodge. Did not join for the purpose of killing anybody.

Never made up my mind to kill anybody, don't know when fellows made up their minds to kill anybody. Didn't see Sweat Coleman give Hicks a gun. Didn't come here to organize a lodge for killing people. Didn't find out that anybody was to be killed. I heard this Hill say there was going to be trouble, but heard nothing said about killing anybody. Have not heard anybody else say there was going to be trouble except Hill, and heard no talk about killing anybody that morning" (Record, pp. 31–39 inc.).

It is to be observed that the defendant in the indictment is Ed Hicks, not Frank Hicks who is said to have made the shots (Record, p. 26).

The next witness, WALTER WARD, knew the defendants belonged to the Union.

"They took guns when they went to the Union. Heard leaders say they were looking for trouble. Ed Hicks was one and Hill was one. Told me Knox was vice-president. Paul Hall woke me up on Wednesday morning about 4.30 and told me to go to Ed Hicks's house. I told him I was sick, and he told me I had got to go, and to get my gun. I said it was over at old man Keys's, and he said to go if I hadn't no gun. Told me to go to Frank Moore's house. I did not take a gun. Frank Moore gave me a 32 Smith & Wesson. Did not tell me anything until the shooting at Hoop Spur and then hollered 'Come on.' Frank Moore and Coleman were present."

"Where was Knox?"

"Knox was there somewhere, could not tell where. So was Paul Hall, but could not tell where. During the morning did not hear Paul Hall say anything. Heard Frank Moore tell some one that there had been a man killed at Hoop Spur, and said he wanted us to go up there. Did not say why. If they found a man picking cotton in the field, that is where they are going to kill him, right there. Sweat was working his gun around. All he said was, 'I have got a 45–70.' Sweat did not say what he was going to do with it. We went down across the field, Paul Hall in field on

one side of railroad, Coleman on other side, Knox up on the railroad. Frank Moore was sitting down close to Frank Hicks, who made two shots up the road toward Dr. Richardson's house, right up the road. He shot north" (Record, pp. 40–43).

Cross-examination.

"I did not have any gun. I was told to go to Ed Hicks's house and wake up all on the road. No one went with me. I went because I was scared to go to white folks. I have been indicted with the bunch for some kind of murder, the killing of Clinton Lee. I did not shoot at him or tell anybody else to shoot at him, or have any agreement that he or anybody else should be killed. There was no trouble on hand when Hill spoke. Never heard any members of the defendants or anybody else say that anybody was to be killed. Nobody told Frank Hicks to shoot that gun. George Green told him not to shoot. I ran. Started to run and they said: 'Stop! Where in hell are you niggers going?' We stopped. Some of us lay down in the woods, some of us got behind the stumps until Frank Moore said, 'Let's go.' So far as I know the defendants have not done anything to anybody. Went on across Craig's field and went back on the place. Knox was with me. We were getting out of trouble. Stayed there until Friday and then came on up to Elaine and give up to Mr. Cazort. They told us niggers to come out of the bushes and stop cutting the fool. I hadn't been doing anything, but I was scared to go where the white folks was at. I hadn't done a thing. Don't know as these other fellows made a shot. I woke up the president and told him Frank Moore sent for us to meet over to Frank Moore's house. Don't know who told us to stop running."

"You thought they were going to shoot you?"

"I know they were if I had kept going" (Record, pp. 43–45 inc.).

DAVE ARCHER.

"My name is Dave Archer. Do not belong to the Union. Know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman

and J. E. Knox. On Wednesday morning when the trouble happened I was in the alfalfa patch right behind my house. About ten o'clock Ed Hicks sent out some men after the fellows that didn't belong to the Union to capture them, and they captured me. Carried me over and put me in Ed Hicks' squad over at Paul Hall's house. I stayed there about an hour before I got away. Hicks was pointing out the way for us men to go to watch for the white people. He said they was going to kill the white people when they come down there. That is what Hicks told the men. He told the negroes to do that. I went down in the slough with them, and when we got down in the slough why I laid my weapon down and I says I will be back directly. I says, 'You watch until I come back,' and I went on down in the slough and got in the field the way they carried me; and I went on down to Elaine, and before I got to Elaine the white people was coming up there. I live on Mr. Stokes' place. I went on down to Elaine and told them about they had me and I got away; I got Mr. Slayton to bring me back to his house. I have not been arrested. Ed Hicks took charge of me. I saw Frank Moore at his house, they first carried me to Frank's house."

"Did you hear Frank make a speech?"

"Yes, he said he was going to do the same thing he was telling his men. He was going to kill all the white people that come down there that evening. Did not see Preacher Knox. Saw Sweat Coleman at his house. They carried me right through his yard. Didn't hear him say anything. He was setting on the gallery. He hollered and said, 'Hello, they have got you.' I saw Paul at his house. They carried me over to Frank's, and over to Paul's house. Escorted me from one house to the other. I left when that fellow Hicks told them all to get in the slough. I saw Paul Hall had a Winchester. He said he was watching for the white folks. Ed Hicks and Frank Moore did most of the talking. I didn't hear Sweat say anything, they didn't let me say anything to Sweat. Didn't hear Knox say anything" (Record, pp. 45–47).

Cross-examination.

"I have been with Mr. Stokes at Elaine three years, came from Modoc. Lived there about thirteen or fourteen years with Mr. Jim Harden. When I come from Mississippi over here to Modoc he was there, and I don't know how long that has been. My father-in-law is Alex. Brown. I told Mr. Stokes just as soon as I got away. I told him who carried me over there, the three men, one was named Smith, but the other two boys, Dr. Cruise told me they was named Foster, but they was strangers to me. The army man carried me. They made me get my gun. Double-barrel shotgun, not loaded. I didn't say anything. I was scared, was studying how to get away. Very badly frightened. I took good notice of what the boss men said. They were Hicks and Moore. Didn't hear Knox say anything. Don't know whether he did anything. Never saw his gun. That's all I know, no more than what they done to me" (Record, pp. 47–48).

J. GRAHAM BURKE.

"Know Sweat Coleman, J. E. Knox, Ed Hicks. Don't know Paul Hall. Mr. Mosby and myself had a conversation with them. It was an investigation we were making at that time. Conversation in County Judge's office downstairs. I was not undertaking to commit these people to jail, or acting as a judge. We sent for them. They were in jail. We sent for them and brought them out there. Warrants had been issued for them, but at that time there was no way of getting them tried. I do not know that we advised these men that anything they said would be likely to be used against them. We just merely asked them questions and they either denied them or admitted them. They were not put on notice that we were making any investigation to ascertain whether they were criminally responsible. I knew they were under arrest, and had them brought in by an officer who was present. No coercion was used in talking to these negroes. If anybody made promises of reward I do

not know it. I didn't. The statements were made voluntarily to me or in my presence, and no tactics were indulged in to cause them to make any statements through fear at that time or at any other time. They were not handcuffed" (Record, pp. 49-50).

Asked whether there was any coercion used at any time before they were brought before him replied:

"Not that I know of, Judge Moore. There wasn't any used in my presence."

"Mr. Mosby or myself asked him if he was a member of the Union (Sweat Coleman) and he admitted that he was, and we asked him when he received knowledge of the fact that there had been a man killed at Hoop Spur. Admitted that he found it out the next morning, that he was either at Frank Moore's or Paul Hall's house, and that they ganged up there and after the shooting up at Hoop Spur they went up there with the gang. I don't recall what kind of a gun he said he had, I remember he made the statement that he had a gun, but I don't remember what kind. He made the statement that whoever it was, I have forgotten now who he said notified him, but in any way he went up to Frank Moore's or Paul Hall's house and they set around there, and different ones of them ganged around there until eleven or twelve o'clock when the shooting happened at Hoop Spur—the gang organized and went towards Dr. Richardson's place, and when they got up to the railroad track Sweat told about these two shots being fired. I don't recall now whether he told who it was that made the shots, but there was two shots made there he said, and they split up there and went on each side of the railroad, on which side of the track Sweat was I don't remember what he said about that, whether he said he went towards Yellow Banks or on the other side of the railroad. He was up there and said these two shots were made. Knox's statement was practically the same as Sweat's so far as that point is concerned; that he went up there with the gang, that he got with them and went up towards Dr. Richardson's. Don't recall where he said he was when

these shots were made. Admitted he went up there with gang. Ed Hicks' statement was about the same, that he was in the gang that went towards Mr. McCoy's house; and after he got up there these shots were fired; that he took a gang of negroes and went on one side of the railroad—seems that the crowd split there, part followed Frank Moore and some went with him and went back toward Yellow Banks, but he admitted being in the gang that went up there" (Record, pp. 49–51 inc.).

At the close of this testimony the State rested. The defendants' counsel offered no testimony. So far as the record shows, no argument was made, and as the case took less than an hour, including the charge, it is clear that there was no time for any real argument.

From this evidence it appears first that neither of the defendants did any shooting, and they were convicted upon evidence that they were present when the shots were fired. It was a morning when the community was greatly excited and Negroes were being shot indiscriminately. A party of them gathered together, as they naturally would, but there is nothing to indicate that they did it with the purpose of attacking anybody, or of doing more than defending themselves. There was no evidence that there was any plan to capture Elaine or to kill white people, as was stated to be the fact by Mr. Allen in the public prints. If there had been, it would have been produced at the trial. There was no evidence of any illegal purpose on the part of the organization, although it was stated that there was abundant literature to show it, and a list of the persons who were to be killed, but none of these papers and no evidence of that kind was offered to the jury. There was no evidence of any conspiracy or intent to kill anybody. The nearest approach to it was a statement that one Hill who seems to have been, according to the statement of Allen, a swindler aiming to get money from the Negroes told them that there might be trouble.

There was evidence that a party not charged in the indictment fired two shots from a place at least half a mile away from the place where Lee was killed. It may or may not have come from the rifle of this person, but there was no evidence that the man who fired the shots had any purpose of killing anybody before he fired the shots, and not a particle of evidence that there was any conspiracy or combination to kill, or that any of the other persons there sympathized with his action. The only evidence on that point is that some one urged him not to fire another shot. So far as one or two of the defendants are concerned, there is hardly any evidence more than that they were in the crowd, and yet the jury convicted them of murder in the first degree, punishable by death, which was defined in the judge's charge as murder done with malice aforethought, with premeditation and deliberation, and with a specific intent to take human life at the time the shot was fired (Record, p. 52).

The evidence produced at the trial may be searched without finding anything to warrant the verdict which was rendered.

The Charge to the Jury.

Thereupon the jury were charged orally very briefly. The charge in substance defined the various degrees of murder, and contained the statement that

> "malice shall be implied when no considerable provocation appears, or when all the circumstances of the act manifests an abandoned or wicked disposition. The killing being proven, the burden of proving circumstances of mitigation that justifies or excuses the homicide shall devolve upon the accused, unless by the proof upon the part of the prosecution it is sufficiently manifest that the offence amounted only to manslaughter, or that the accused was justified or excused in committing the homicide."

The court then instructed the jury that the defendants were charged in the indictment with murder in the first degree as principals under the section of the statute which reads as follows: "One who aids, assists, abets, advises or encourages shall be deemed in law a principal, and be punished accordingly." He proceeded: "So if you find from the evidence in the case that the defendants were present at the time that Clinton Lee was killed, and that they, or either of them, aided, assisted, abetted, advised or encouraged the commission of the offense, and were present at the time the offense was committed, then you will find them guilty as charged in the indictment, and the punishment is the same as the principal."

The court instructed them as to what a reasonable doubt was and to give the defendants the benefit of that doubt; also as to the law which enabled them to fix the penalty of death or imprisonment if defendants were guilty of murder in first degree, and that they could find one of the defendants guilty in the first degree, and one guilty in the second degree, or some of them not guilty.

He instructed the jury "that the State was required to prove all the material allegations in this indictment and prove them beyond a reasonable doubt; that it was not a mere possible or imaginary doubt, but such a doubt as would cause a prudent man to pause or hestitate in the graver transactions of life, and a juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of all the evidence he has an abiding conviction of the truth of the charge" (Record, pp. 51–54).

There was no discussion of what the evidence was, and nothing to call the jury's attention to the fact that something more than mere presence when a crime is committed is necessary to make a person a participant in the crime, nothing which would indicate to the jury that there was really any question as to the guilt of the accused. It was purely a formal charge. The jury were out less than five

minutes and returned a verdict of guilty of murder in the first degree against all the defendants. The defendants excepted to the verdict and to the instructions given to the jury by the court, and after that the counsel appointed by the court, who were Messrs. J. I. Moore and Greenfield Quarles, seem to have done nothing more.

On the 11th of November the defendants were sentenced to death by electrocution on the 27th December, 1919.

Motion for New Trial.

A motion for a new trial was made on the 20th of December (Record, pp. 57–60) which was overruled, and the defendants, represented now by new attorneys, Messrs. Murphy, McHaney and Scipio Jones, appealed on the same day (Record, p. 63).

The grounds urged in the motion were the state of public feeling against the defendants, the fact that the defendants and witnesses were frequently subjected to torture for the purpose of extracting from them admissions of guilt and to make them testify against the defendants; that they were given no opportunity to consult with their friends and seek assistance, or informed of the charge against them until after their indictment; that they were carried from jail to the courtroom without having been permitted to see or talk with an attorney or any other person in regard to their defense; that the court appointed counsel for the defendants without consulting them, or giving them an opportunity to employ their own counsel; that the state of public feeling was such that they could not have a fair jury; that the trial proceeded without their consulting with their counsel or any witnesses, or being given an opportunity to obtain witnesses; that they were never in court before and were entirely ignorant of what they could do to defend themselves; that the trial from beginning to end occupied three-fourths of an hour and the verdict was

returned in from three to six minutes. Four of the defendants say that they never had a copy of the indictment served upon them, one had it only forty-eight hours before the trial (Record, pp. 57, 58).

Another ground was that under the practice which prevailed in the State only white men were summoned to sit on the grand jury or the jury, and that by this discrimination the defendants were deprived of their rights under the Constitution of the United States; that they had no notice or knowledge of what steps they should take to raise this point before the trial; that the verdict is contrary to the law and evidence (Record, pp. 58, 59).

To this motion are attached two affidavits, one of Alf Banks, Jr., and another of William Wordlaw who testified to the fact that they were whipped, placed in the electric chair and strangled by something put in their noses to make them testify. These defendants did not suffer from what was done to these witnesses, as they did not testify at their trial, but their affidavits confirm the testimony of the others as to the treatment to which the Negroes in confinement were exposed (Record, pp. 60–62 inc.).

The State Supreme Court's Opinion.

On appeal the case was argued in the Supreme Court of Arkansas on the 22d of March (Record, pp. 63, 64). On March 29th the court overruled the motion in an opinion found in the record (pages 64–67 inc.).

In this opinion on page 65 the court state that according to the affidavits filed in support of the motion the defendants were members of the organization known as the Farmers Progressive Household Union of America, who held meetings from time to time for the lawful purpose of promoting the financial interests of its members; that while one of these meetings was in progress an automobile containing two white men and one Negro passed along the

public road and stopped some forty or fifty yards away from the building, "whereupon the pickets fired into the car and killed one of the men in it."

There was no testimony of this sort at the trial in this case, as the record shows, and the attitude of the court toward the case may be inferred from the fact that this statement appears in the opinion.

The court proceeds then to comment on the fact that a number of the lodge members assembled about the houses of the appellants about a mile from Elaine where the shooting had occurred, practically all were armed, and Moore made the statement that they would kill all the white people who came there, but this was explained by saying that they gathered to defend themselves against attack. Then the court states that on hearing firing they proceeded to march toward Elaine, "Moore having said that some of their members were being attacked and they would go and help them fight" (Record, p. 66). This goes beyond the testimony given at the trial (Record, pp. 39, 40, 48, 49, 54, 55), and especially in changing Moore's alleged statement from a declaration of what "he" intended to do to a statement of what "they" intended to do.

The opinion comments on the fact that when Hicks said he would shoot, one member of his party told him not "to do so, but no one made any attempt to restrain him," and after the shooting the party dispersed.

This certainly, even as stated by the court, is no evidence that the defendants, no one of whom had fired a shot, was guilty of murder in the first degree.

The court proceeds to say that defendants now insist that "because of the incidents developed at the trial and those recited in the motions for new trials no fair trial was had or could have been had," and that the trial did not constitute due process of law, and then says:

> "It is admitted however that eminent counsel was appointed to defend appellants, and no attempt was made to

show that a fair and impartial trial was not had except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

"We are unable to say that this must necessarily have been the case. The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdict returned. We cannot therefore in the face of this assume that the trial was an empty ceremony conducted for the purpose only of appearing to comply with the requirements of law when they were not in fact being complied with" (Record, p. 66).

The opinion concludes:

"We have given these cases the careful consideration which their importance required, but our consideration is necessarily limited to those matters which are properly brought before us for review, and as no error has been made to appear in either case the judgments must be affirmed."

The court in dealing with the case treats the allegation in the motion for a new trial that the witnesses were tortured to make them testify against the defendants, and all the other allegations which show that at the trial the court was surrounded by a mob determined on a verdict of guilty, as incidents, and say that they cannot say that a fair trial was "*necessarily*" impossible.

It is difficult to conceive the state of mind of the court which would lead it to say that the torture of witnesses to make them give false testimony does not effect the fairness of the trial, but the thing which distinguishes this case from the *Frank* case is that the Supreme Court of Arkansas did not pass on the question whether the allegations in the motion for a new trial of violence, prejudice, torture and mob pressure on the jury were true or not. The court assumed that they were true, and said it did not follow from them that the trial was *necessarily* unfair.

This is in substance saying that the defendants must actually prove that the jury were influenced, must prove that the trial was unfair, whereas the well-established rule of law is that where circumstances like this are proved, the trial cannot stand unless it is affirmatively proved that it was fair, and the court will not admit such proof.

The rule has always been as stated in *Allen* v. *United States*, 150 U. S. 551, where speaking of a passage in the charge of the judge "as the mistake *might have* prejudiced the jury, it was error."

See also *Bucklin* v. *United States*, 159 U. S. 682, at 686, 687, where of a mistaken charge the court said, "This tended to coerce the jury into making a verdict," and "as this error may have injuriously affected the rights of the accused, the judgment is reversed."

Carver v. *United States*, 160 U. S. 553, where the admission of incompetent evidence "may have had so important a bearing that its admission must be regarded as prejudicial error."

Brown v. *Cummings*, 7 Allen, 507, 509, where speaking of evidence improperly admitted the court say, "Although this evidence was not noticed by counsel on either side in addressing the jury, or by the court in instructing them, yet it is impossible to know that it had no effect upon their verdict," and therefore the verdict was set aside.

See also *Maguire* v. *Middlesex Railroad Company*, 115 Mass. 239, at page 241.

These cases state the true rule, and that rule was ignored by the Supreme Court of Arkansas, which was content to deny a new trial and send these defendants to their death without even considering whether the allegations contained in the motion were true or not.

We contend that this opinion of the court shows what the feeling in the State was, and how indifferent the court was to the rights of the defendants. There was no finding

that the facts as to the treatment of witnesses and the pressure from the mob were not true. The suggestion that from the presence of the defendants when Hicks killed Lee an inference might be drawn that they aided, abetted or assisted him in doing so is certainly a very forced inference, and goes far beyond any interpretation of the evidence which would make these defendants beyond a reasonable doubt guilty of murder with malice aforethought, the most serious crime known to the law. No member of this court or any court would feel, if he were charged with crime, that proceedings such as those taken in this case gave him a fair trial.

As to some of the defendants there is hardly evidence to show that they were there.

The court was asked to rehear this case by a motion filed April 14, 1920 (Record, pp. 69, 70), which points out that the assumption of the court that the petition as to the composition of the grand jury came too late could not be supported, because it was presented at the earliest possible opportunity; that the statement of the court, that certain facts were alleged in the affidavits supporting the motion for a new trial, was also unwarranted because nothing was said on the point in question either in the motion for a new trial or in affidavits supporting them.

The motion for a rehearing makes a strong appeal supported by the facts, but it was overruled on the 26th April 1920 without any statement of reasons or any finding as to the facts (Record, pp. 68–70 inc.).

Subsequently an application was made to the Chancery Court for an injunction to restrain the sheriff from executing the prisoners and the injunction was granted, but the Chancery Court suspended its operation pending a decision by the Supreme Court of Arkansas as to whether it had jurisdiction, and after a hearing that court decided that the Chancery Court was without jurisdiction (Record, pp. 79–86 both inc.; see p. 83).

It may be noted in passing that in the opinion of the Supreme Court in this case the court said that no exceptions were taken at the trial (p. 81), the language of the court being, "There were no exceptions saved during the progress of the trials, but the records show that counsel for the accused cross-examined all of the State's witnesses at length" (Record, p. 81), a statement which the record hardly sustains.

Both opinions of the Supreme Court show that the allegations of facts in the petition for *habeas corpus* were urged upon it and in neither case did the court deal with these allegations or find that they were not true.

THE LAW.

The case which is presented to the court may be summed up as follows: A condition of things apparently existed in Phillips County, Arkansas, which culminated in an attempt by white men to break up a meeting of Negroes in the course of which one white man was killed, but whether by his own party or by Negroes there is nothing to show. The consequence was a state of great excitement, in the course of which inflammatory statements were made alleging that there was a deliberate purpose on the part of the Negroes to attack and kill their white neighbors, which was readily believed though on its face it is absurd. The whites assembled, shot and killed the Negroes indiscriminately to a very large extent, and tried to lynch those that were arrested, but better counsels prevailed, and they were persuaded to abandon this purpose by an assurance given by leading citizens that the accused men should be dealt with according to law, that "justice would be done and the majesty of the law upheld." The state of public opinion is shown by the statements that were printed in the newspapers, by the resolutions of various bodies, commercial and otherwise, and it is perfectly clear that the community demanded the conviction and execution of those

who were accused, and that nothing short of an assured equivalent for lynching would have prevented the mob from killing the prisoners.

The trial was in every respect unfair, the time occupied and the character of the evidence show how little effort was made to really determine the merits of the case. The public demanded victims, and the public demand overawed the courts with the result that these helpless and ignorant Negroes were convicted with a view to their prompt execution. Nowhere in the history of the case from beginning to end is there any indication that prior to the conviction there was any serious attempt made to ascertain whether the defendants were really guilty. The evidence on which they were convicted was manufactured, the witnesses were beaten and terrorized, and the record of the whole case shows what, if consummated, is only judicial murder.

The leading case on the subject is the case of *Frank* v. *Mangum*, 237 U. S. 309. In that case the law is laid down clearly in both the majority and minority opinions of the court.

In the majority opinion the statement is made that "the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a State on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the State, and not merely a single step in those proceedings."

"There is no doubt of the jurisdiction to issue the writ

of *habeas corpus*" and "it was the duty of the court to refuse the writ if it appeared from the petition itself that the appellant was not entitled to it."

"Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it."

Later the court rejects "the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort."

And then follows: "We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is in that court a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

And they further say, "We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated."

In the minority opinion we find the succinct statement that "*habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces

the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted." Followed by the later statement: "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts."

As an illustration of what the court calls an extreme case we find in the minority opinion this statement: "If the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this court would allow itself to be silenced by the suggestion that the record showed no flaw." And the conclusion is that "supposing the alleged facts to be true, we are of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."

In Frank's case he had a trial which lasted for four weeks, in which he had the assistance of several attorneys. The ground for *habeas corpus* was the fact of alleged disorder in and about the courtroom, including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. It was stated that the defendant was not in the courtroom when the verdict was rendered, his presence having been waived by his counsel. The question of whether there was disorder was heard by the trial court and afterward by the Supreme Court of Georgia on evidence, and the finding was that the trial court was war-

ranted in finding that only two of the alleged manifestations occurred within the hearing or knowledge of the jury,—(1) laughter by spectators while the defense was examining one of its witnesses, and (2) applause by the spectators during a colloquy between the solicitor general and counsel for the accused,—whereupon, the defendant's counsel complaining, the court directed that order should be maintained.

The Appellate Court ruled that the action of the trial court was a manifestation of the judicial disapproval, and a sufficient cure for any possible harmful effect of the irregularity, and it was deemed sufficient by the counsel, who made no request for further action by the court.

Further complaint was that there was an indication of popular approval of a verdict of guilty while the jury was being polled, which was done after the jury had reached their verdict and were merely reaffirming it by individual declaration.

The *Frank* case was absolutely different from the case which is presented here. It is hard to say that the absence of a prisoner at a time when a verdict is rendered invalidates the trial, especially when it is consented to by counsel, for it is in reality a mere form, and the effect of such absence may well be left to be dealt with by the State where the trial is held. Nor are expressions of feeling by spectators during the trial of a case, if promptly repressed by the court, a reason for disregarding the verdict. The questions of fact which were raised in Frank's case were carefully considered by the Supreme Court of Georgia, and disposed of in accordance with the laws of that State, nor did they, in the opinion of the majority, show such mob control of the court as denied the defendant due process of law.

Very far different are the facts in this case. As against a trial lasting four weeks, and a defense by counsel heartily espousing the cause of their client, selected by him and conferring with him and giving him the opportunity to study his defense, we have a trial lasting about three-

quarters of an hour, held very shortly after the indictment, with no opportunity given the defendants to consult counsel, with no earnest defense, with no conference between clients and counsel, no opportunity to summon witnesses, no opportunity to take the stand in their own defense, none of the several rights which men on trial for their lives are entitled to be accorded in courts of justice.

We have the whole community inflamed against the defendants, prepared themselves to lynch them, only refraining from so doing because they are assured by leading citizens that the trial should accomplish the same purpose, a condition of things where no man who was on that jury and had ventured to vote for acquittal or delay could have lived in Phillips County, according to the testimony of one of the men who engaged in the business of manufacturing evidence for the State. We have false statements printed in the newspapers; we have society substantially organized to convict these people; and more than that, we have witnesses deliberately terrorized and forced on pain of death or torture to give false testimony. We have the testimony of the witnesses themselves that they were so terrorized and that their testimony was false. We have the testimony of the men who inflicted the torture; we have a mass of evidence which shows, if evidence can show anything, that the defendants never had a fair trial and in fact that they were innocent. As to some of them there is no evidence as to any act or word except that they were with a gang of Negroes assembled to all appearances for self-defense.

We have distinct evidence that all Negroes at that time were in danger of their lives, and that two or three hundred men were killed. What would be expected of human beings in circumstances like that? Can we ask that they lie down and be killed without any attempt to assemble for their own protection. The courts of Georgia had not before them all the evidence which was presented to the District

Court of the United States, and the questions which we ask this court to consider were never considered by those courts. The allegations of fact were never considered by the Supreme Court of Arkansas as they were by the Supreme Court of Georgia in the *Frank* case, but the opinions apparently assume that they were true. This distinction between the cases is vital.

The statement in the opinion in reply to the claim that a fair trial was impossible was, "We are unable however to say that this must *necessarily* have been the case." No one dealing with the operation of another man's mind can undertake to say what motives *necessarily* influence him, but all judicial action is founded upon the constant assumption that certain influences will produce certain results on human action. There can be no question that the citizens of Helena were determined that these men should be convicted, and that they manufactured the evidence for the purpose; and for the court to say that it cannot assume that the accused *necessarily* did not have a fair trial shows clearly that the Supreme Court of Arkansas was itself influenced by the same feeling that influenced the leaders of society throughout the region where these tragedies occurred.

If this Court on reading this petition, these affidavits and this record is not satisfied that if there ever was a case in which *habeas corpus* should be granted this is the case, no argument of counsel will convince them, and we submit with confidence that either *habeas corpus* should be granted in this case or *habeas corpus* is not a practical remedy for such outrages as the evidence in this case discloses. This is in fact the extreme case which the minority of this court used as an illustration in the *Frank* case.

JURISDICTION OF THE STATE SUPREME COURT.

As bearing on the effect of the decision by the Supreme Court of Arkansas on the rights of the petitioners, attention is called to the narrow scope of that court's jurisdiction in criminal cases, as defined in § 3413 of Crawford & Moses's Digest of the Statutes of Arkansas:

> "A judgment of conviction shall only be reversed for the following errors of law to the defendant's prejudice appearing upon record:
>
> "*First.* An error of the circuit court in admitting or rejecting important evidence.
>
> "*Second.* An error in instructing, or in refusing to instruct, the jury.
>
> "*Third.* An error in failing to arrest the judgment.
>
> "*Fourth.* An error in allowing or disallowing a peremptory challenge.
>
> "*Fifth.* An error in overruling a motion for a new trial."

The Supreme Court, that is to say, cannot reverse the findings of the Circuit Court upon any question of fact, but can set aside a conviction only if some ruling of the Circuit Court was wrong as matter of law. In the case at bar, the question whether the circumstances surrounding the trial were such as to render impossible a righteous verdict was primarily a question of fact. Hence the Supreme Court could not, without exceeding its jurisdiction, reverse the action of the circuit court in refusing a new trial.

This is equivalent to saying that, under the laws of Arkansas, the only court that had jurisdiction to pass on the fundamental issues raised by the motion for a new trial was the Circuit Court of Phillips County, presided over by the judge before whom the trial had taken place; (Constitution of Arkansas, Art. VII, § 13: "The state shall be divided into convenient circuits, each circuit to be made

up of contiguous counties, for each of which circuits a judge shall be elected"; Crawford & Moses's Digest § 2206: "Until otherwise provided by the general assembly the judicial circuits shall be composed of the following counties: *First*, White, Woodruff, St. Francis, Lee, Phillips. *Second*, Greene, Craighead," etc.), and upon an application made at the same term at which the judgment was rendered (Crawford & Moses's Digest, § 3218: "The application for a new trial [in a criminal case] must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment"). In the case at bar, as will be remembered, there was no postponement of judgment, everything possible being done to hasten the final disposition of the case.

The theory of the decision in *Frank* v. *Mangum*, 237 U. S. 309, is that, in a situation like that now presented, a State cannot be said to have deprived an accused person of life or liberty without due process of law if it has provided an independent tribunal for the examination of his complaint and this tribunal, sitting in an atmosphere free from the alleged disturbing elements, has held the complaint unfounded. Arkansas, as has just been shown, has made no provision of this kind.

It would be preposterous to say that the requirements of the Fourteenth Amendment are satisfied by giving one seeking a new trial because the court in which he was tried was guilty of the grossest irregularities nothing but the empty right to have the facts upon which his application is based passed upon by the very judge whose conduct is complained of, and that, too, only at a time when the adverse influences, if they ever existed at all, must still be operative with all their force.

THE EXCLUSION OF NEGROES FROM THE JURIES.

The fact that no Negroes were summoned to serve on either the grand or the petit jury, if taken in time should have led the court to quash the indictment.

Ware v. *State*, 146 Ark. 321.

The omission to make the point in time was the fault of the counsel appointed by the court.

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